

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CARL S. WILLIAMS
Claimant

VS.

THE BOEING CO. - WICHITA
Respondent

AND

**AMERICAN MANUFACTURERS
MUTUAL INSURANCE CO.**
Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 192,093

ORDER

Respondent appeals from an August 30, 1994 Preliminary Hearing Order by Administrative Law Judge Shannon S. Krysl.

ISSUES

The Administrative Law Judge granted claimant's request for preliminary benefits. The issues raised by respondent on appeal are:

- (1) Whether timely notice was given; and
- (2) Whether injury arose out of and in the course of employee's employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, for purposes of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board has jurisdiction to review a finding that claimant gave timely notice. K.S.A. 44-534a. This jurisdiction includes the authority to determine whether claimant has established just cause for failure to give notice within ten (10) days.

Claimant, a sixteen and one-half (16½) year employee of respondent, alleges injury to his low back while lifting a box on April 25, 1994. He admits not giving his employer notice of his alleged work-related injury within ten (10) days. However, claimant alleges he had "just cause" for his failure to give such notice.

K.S.A. 44-520 provides that a claim is barred where notice is not given within ten (10) days unless the claimant establishes just cause for his failure to give ten (10) day notice and notice is given within seventy-five (75) days. In this case, notice was given

within seventy-five (75) days. Claimant testified that he did not immediately notify his supervisor of the accident. It was approximately thirty-five (35) days after the alleged injury that claimant told his employer that his injury was caused by a work-related activity. The explanation claimant gave at the preliminary hearing as his reason for the delayed reporting of his accident as a work-related incident was that he feared that he would lose his job and that he expected to have a swift recovery from what he perceived to be a temporary condition. The Appeals Board finds that the record does not bear out the claimant's position on either count.

First, the claimant had been at the time of the alleged accident an employee of the respondent for over sixteen (16) years. He admitted being aware of the respondent's policy requiring all work-related injuries to be immediately reported to one's supervisor. There is no indication that claimant's concerns about being terminated were he to report a work-related injury were founded upon fact or reason.

With regard to claimant's explanation that he did not consider his injury to be serious, it appears to the Appeals Board that the claimant should have known otherwise much sooner than he now admits. The lifting incident he describes caused an immediate "strong, severe pain". He sought medical treatment the following day with a chiropractor with subsequent chiropractic treatment. This did not afford relief and on or about May 4, 1994 he sought the services of a medical doctor. He was advised at that time if his condition did not improve in a couple of days that he should see an orthopedic surgeon. Claimant's condition did not improve and, in fact, worsened to the point that claimant did contact an orthopedic surgeon. Despite the worsening of his condition and the resulting escalation of the medical treatment claimant was seeking, he still did not report that his accident was work related to his employer until after undergoing physical therapy and consulting a second orthopedic surgeon who advised that surgery could be necessary. Although claimant worked the remainder of the week following his accident, he was off work due to his back pain during most of the thirty-five (35) day period that elapsed between his accident date and the date he ultimately reported his injury to be work related. Claimant's credibility is further compromised by the fact that he failed to report to any of the chiropractors, physicians or physical therapists during this period that his injury was the result of a work-related trauma. The first indication that claimant gave that his injury was work related was to the second orthopedic surgeon he saw who in turn contacted respondent's workers compensation carrier. Three or four days later, claimant called Central Medical at Boeing to report his work-related injury and to seek authorization for further medical treatment. By this time claimant had already been advised that surgery was a possibility.

In proceedings under the Workers Compensation Act the burden is placed upon the claimant to prove by a preponderance of the credible evidence the various conditions upon which claimant's rights depend. K.S.A. 44-501(a). See also *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993). The provisions of the Workers Compensation Act shall be applied impartially to both employers and employees. K.S.A. 44-501(g). In determining whether the claimant has satisfied his burden of proof, the trier of facts shall consider the whole record.

The claimant's state of mind is significant not only to a determination of "just cause" but is necessary to explain the medical treatment records which speak against a work-related injury. In finding claimant's claim to be compensable and ordering preliminary benefits, the Administrative Law Judge commented favorably on the credibility of the claimant. Where the testimony is conflicting the Appeals Board generally gives deference to such findings by an Administrative Law Judge who has had the opportunity to personally witness a person's testimony. Even so, in this case when considering the record as a whole as it presently exists, and for purposes of preliminary hearing only, the Appeals Board finds that the claimant has failed to meet his burden of proving that his failure to notify his employer of a work-related accident within ten (10) days thereof was due to just cause. Having so found, the Appeals Board need not reach the issue of whether claimant has met his burden of proving accident arising out of and in the course of his employment. This claim is therefore barred by the provisions of K.S.A. 44-520.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order entered by Administrative Law Judge Shannon S. Krysl dated August 30, 1994 should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of September 1995.

BOARD MEMBER _____

BOARD MEMBER _____

BOARD MEMBER _____

c: Mark T. Schoenhofer, Wichita, KS
Eric K. Kuhn, Wichita, KS
Marvin R. Appling, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director